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To Be Argued By:
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STATE OF NEW YORK COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

NINA E. LEIBOWITZ,

Appellant.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

		PAGE
PRELIMINARY STATEMENT		1
STATEMENT OF FACTS		2
POINT I:	PENAL LAW SECTION 245.01 WHICH PROHIBITS WOMEN, BUT NOT MEN, FROM APPEARING TOPLESS IN PUBLIC VIOLATES THE EQUAL PROTECTION GUARANTEES OF BOTH THE NEW YORK AND UNITED STATES CONSTITUTIONS AND THEREFORE, IS UNCONSTITUTIONAL.	4
	A. Introduction.	4
	B. Absent Any Relevant Difference Between Male And Female Breasts, Section 245.01 Unfairly Discriminates Against Women.	5
	C. The Gender-Based Discrimination Inherent In Penal Law §245.01 Actually Serves To Harm Women.	10
CONCLUSION		12

PRELIMINARY STATEMENT

This is an appeal from a judgment of the City Court of Rochester, Monroe County rendered December 13, 1989, wherein Nina Leibowitz was found guilty of violating Section 245.01 of the Penal Law.

Ms. Leibowitz was sentenced by the Honorable John Manning Regan to a conditional discharge for one year and the requirement that she perform sixteen hours of community service.

Ms. Leibowitz was represented by Monroe County Public Defender Jeffrey Wicks, Esq., of counsel. A Notice of Appeal was timely filed. By order of the Court, the Monroe County Public Defender was assigned to perfect Ms. Leibowitz's appeal.

STATEMENT OF FACTS

Nina Leibowitz was charged in Indictment Number 10498/89 with Exposure of a Person. This charge emanated from her conduct on June 24, 1989, when Ms. Leibowitz and nine other women refused a police officer's order to put their shirts on while picnicking on the beach at Durand-Eastman Park.

The essential facts at trial were uncontroverted. The testimony established that the Marine Patrol responded to a call that there were "a hundred naked people" on the beach at Durand. Upon arrival at the scene, the officers found approximately thirty women without clothing above their waists (T.M. 20-21). After additional officers arrived via Lakeshore Boulevard, the police proceeded to tell the women but not the men to put their tops back on (T.M. 27). Ten women refused, at least one remarking that she would not put her shirt on unless everybody on the beach was so required, men included (T.M. 140). The women were subsequently arrested and charged with the violation of Penal Law §245.01, Exposure of a Person. Nina Leibowitz was one of the women arrested.

At trial, the People established that the women had been on the beach with their breasts exposed, that they had been aware of the law regarding exposure of breasts, and that they had refused to cover their breasts (T.M. 121, 122, 132, 143, 144, 157).

The defense contended that Penal Law §245.01 violated both the New York and the United States Constitutions' guarantee of Equal Protection by prohibiting women from appearing in public topfree but allowing men to do so. Each of the ten defendants testified regarding not only the day of their arrest but other times in the

past when they had been topfree in public in the Rochester area. The defendants also testified to harms they perceived caused by a law forcing them, but not men, to wear their tops in public.

The defense called Dr. Rita Freedman, expert in psychology and women's studies, who testified to a wide range of psychological harms potentially suffered by women as a result of laws forbidding them to go out in public (T.M. 28-65). Also, Jeff Ulrich, program manager at WROC TV-8, testified that, according to the Nielsen ratings, approximately 54,000 people saw live footage of the topfree defendants on the six o'clock and eleven o'clock news broadcasts (T.M. 229). The station received no complaints (T.M. 230).

Despite evidence that male and female breasts are physiologically similar except for the female ability to lactate (T.M. 31-33) (an exception specifically provided for in Penal Law §245.01), and despite any evidence of public disturbance (T.M. 34), Judge Regan upheld Penal Law §245.01, citing the need for women to keep their breasts covered in order to maintain public decency and morality so as to preserve social order and tranquility (Judge Regan's written decision, hereinafter Regan, p. 9). On December 13, 1989, Judge Regan sentenced Ms. Leibowitz to a conditional discharge for one year and the requirement that she perform sixteen hours of community service.

POINT I: PENAL LAW SECTION 245.01 WHICH PROHIBITS WOMEN, BUT NOT MEN, FROM APPEARING TOPLESS IN PUBLIC VIOLATES THE EQUAL PROTECTION GUARANTEES OF BOTH THE NEW YORK AND UNITED STATES CONSTITUTIONS AND THEREFORE, IS UNCONSTITUTIONAL.

A. Introduction.

The appellant in this case was found guilty of violating Section 245.01 of the New York State Penal Law which states:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private of intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breast-feeding of infants or to any person entertaining of performing in a play, exhibition, show or entertainment.

Penal Law §245.01 is a gender-based statute (in that it defines exposure differently for men and women) which discriminates against women solely because of their sex. By so discriminating, Penal Law §245.01 violates both the New York and Federal guarantee of Equal Protection.

A gender-based statute violates constitutional equal protection guarantees unless the classification which favors one gender is substantially related to the achievement of an important government objective. People v. Liberta, 65 N.Y.2d 152 (1984) citing Caban v. Mohammed, 441 U.S. 380 (1979); Craig v. Boren, 429 U.S. 190 (1976); People v. Widden, 51 N.Y.2d 457, app. dism. 454 U.S. 803 (1980). The government bears the burden of showing both the existence of an important

government objective and the substantial relationship between the discrimination in the gender-based classification of the statute and that objective. Liberta at 168; Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

As illustrated below, the gender-based discrimination resulting from Penal Law §245.01 fails to substantially relate to the achievement of an important government objective. The court below stated that limitations on public nudity are required in order to maintain public morality and thus preserve domestic tranquility. However, as the case at bar clearly depicts, it is patently unjust to subject women to legal constraints not similarly imposed upon men solely out of fear that exercise of such rights by women would cause men to become so disturbed as to breach the peace. As detailed below, such paternalistic notions regarding women are unjust and arcane. Further, as this case illustrates, these rationalizations are plainly misguided. The behavior of Ms. Leibowitz and her companions caused no such disturbances whatsoever.

B. Absent Any Relevant Difference Between Male And Female Breasts, Section 245.01 Unfairly Discriminates Against Women.

As noted, for a gender-based statute to withstand constitutional scrutiny, the classification which favors one gender must be substantially related to an important government objective. People v. Liberta, 65 N.Y.2d 152 (1984) (emphasis added). In deciding the case at bar, Judge Regan wrote that in order to keep society "ordered, disciplined and tranquil", public morality and decency must be maintained (Regan 9). And in order to maintain this morality and decency, nudity must, accordingly, be limited (Regan 9).

Relying on the case of People v. Hallman, 68 N.Y.2d 202 (1986), Judge Regan denied the appellant's Motion to Dismiss on Equal Protection grounds. Hallman, supra, however, is irrelevant to the case at bar. Hallman, supra, involved a man arrested for appearing completely nude on a beach in New York City. In Hallman, supra, the Court of Appeals held that nudity is not a fundamental right guaranteed by the Constitution. The right to appear nude in public, though, is not the issue in the case at bar. Rather, at issue here is the fundamental right of women to be treated the same as men under the law. Yet Judge Regan disregarded expert testimony concerning the physiological similarities between male and female breasts and instead focused upon what he believed to be differences in the reactions invoked by the display of female verus the male breast.

Noting that, physiologically, the primary sexual organs do not include the breasts of either sex (Regan 13), Judge Regan wrote that the female breast, as opposed to the male's, "possess the erotic properties of a primary sexual organ" (Regan 13). In other words, Penal Law §245.01 was held constitutionally valid, despite any physiological difference between male and female breasts, because, psychologically, female breasts are deemed by males as sexually erotic. This can only mean that the statute's sole purpose in forbidding women to appear in public topfree

is to keep men from becoming sexually aroused and acting in an immoral and publicly disturbing manner.[1]

As explained by the U.S. Supreme Court in Frontiero v. Richardson, 411 U.S. 577 (1973), (where the Supreme Court overturned statutes classifying spouses of male service members as dependents but not spouses of female service members unless they were dependent for over one half their support), such romantic paternalism is typical of the traditional rationalization used to justify discrimination, which, in practical effect, puts women, not on a pedestal, but in a cage. Id. at 684. By prohibiting women from enjoying a right similarly exercised by men solely out of fear of how others, namely men, may react is in direct contradiction to the requirements of the Equal Protection guarantees of the New York and United States Constitutions. Imagine if the courts had used similar justification to uphold segregation laws for fear that the sight of blacks using the same beaches or bathrooms that whites used would so excite and upset whites as to cause a public disturbance. In analogous circumstances, the United States Supreme Court held that First Amendment freedoms cannot be censored merely because it is believed that

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[1] The decision to uphold the constitutionality of Penal Law §245.01, based on a holding that the female breast need remain covered because it is so sexually erotic, ignores both the history of the statute and of society's changing attitudes. For instance, in 1944 the Penal Law forbade willful and lewd exposure of "(the) person, or the private parts thereof," Section 1140. The statute neither limited illegal exposure of one's "private parts" nor distinguished between males and females as does the current statute. Also, reaction to the exposure of women's legs is a prominent example of changing public perception. Where it was once considered immoral and unfashionable for a woman to expose any part of her legs, revealing skirts, shorts, and especially bikinis are now commonly worn by women.

what is being expressed might excite the audience as to create a public disturbance. Terminello v. Chicago, 337 U.S. 1 (1949). It is the obligation of the state in these situations to protect the rights of its citizens by prosecuting not those who exercise the right of citizens, but rather those who create disturbances in reaction to the lawful exercise of rights.

Furthermore, the argument that topfree women would cause a public disturbance is, at best, of questionable validity. The public, in Ms. Leibowitz's case, did not react unfavorably. Ironically, despite the lower court's concern, not one police officer was able to testify that any disturbance or problem was caused by the "topfree" activities of Ms. Leibowitz and her friends (T.M. 30, 57, 64-65, 76-77, 88). When one officer was asked if any crowds gathered due to the defendants' activities, he replied that no crowds gathered until the police got there (T.M. 43). The only complaint regarding the defendants' activities to which any witness testified was after the officers arrived at the scene. Other than this one "family" which was purportedly upset by the presence of "topfree" women on the beach, there was no evidence of any complaints (T.M. 55-56). Furthermore, several defendants testified that they had experienced being "topfree" on many prior occasions, in public, without complaint (T.M. 131-133, 147-149, 182-183, 202, 263-264). Finally, it is significant that out of a viewing audience of approximately 54,000 people, not one complaint was reported when WROC-TV program manager Jeff Ulrich decided to air pictures of bare-breasted defendants on the evening news (T.M. 230).

Finally, it is not the function of the Penal Law in our government policy to provide either a medium for the articulation or apparatus for the intended

enforcement of moral or theological views. People v. Onofre, 57 N.Y.2d 475, 488, note 3 (1980) (statute forbidding consensual sodomy held unconstitutional). In the case at bar, Judge Regan wrote, "while we are pluralistic in composition, the great majority of our people observe Judeo Christian moral standards." (Regan 9). As noted, our constitutions are meant to protect the minority as well as "the great majority of our people" and are generally put to the test under exactly such circumstances. After quoting extensively from the Book of Genesis, Judge Regan wrote,

> Nudity, accordingly, in the Judeo-Christian ethnic, is a catalyst for shame, and for immoral behavior. It triggers a compelling and immediate choice between good and evil for anyone who possesses the knowledge of good and evil. Judeo-Christian morality bans public nudity therefore to reduce the incidence of that choice and, correspondingly, to reduce the incidence of public misbehavior.
>
> (Regan 10.)

Ms. Leibowitz respectfully asserts that religious underpinnings can neither validate nor vitiate legislation which discriminates against a particular class of citizens. In the case at bar, any religious doctrine can only be relevant of the fact that it reflects society's attitude to justify discrimination, the very problem the Bill of Rights seeks to negate. In People v. Onofre, 51 N.Y.2d 475 (1980), the court wrote, "the community and its members are free to employ theological teaching, moral suasion, parental advise, psychological and psychiatric counseling and other noncoercive means to condemn the practice of sodomy." Id. at 488 note 3. This reasoning is directly applicable to Ms. Leibowitz's case.

It is not the purpose of this brief to ask the Court to second-guess the Legislature. But when the Legislature determines to treat males differently from females there must exist an important government interest and a substantial relationship between the discrimination in the statute and that objective. As described in this brief, there is no such legitimate substantial relationship reflected in Penal Law §245.01. Absent any relevant physiological differences between the breasts of males and females, that statute violates the Equal Protection guarantees of both the New York and the United States Constitutions by depriving women of a right accorded to men.

C. The Gender-Based Discrimination Inherent In Penal Law §245.01 Actually Serves To Harm Women.

The Court of Appeals in People v. Liberta, 64 N.Y.2d 152 (1984), recognized that in order for the Government to meet their burden of proof in the substantial relationship test it is required, among other things, to show that the gender-based law serves the governmental objective better than would a gender-neutral law. In that case the court held "a gender-neutral law would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assault." Quoting the Supreme Court the Court reasoned, "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." Liberta, 64 N.Y.2d at 170.

In the case at bar, far from serving the governmental objective better than a gender-neutral law, the uncontroverted evidence demonstrates that Penal Law

§245.01 actually harms women. Dr. Rita Friedman, a well-known psychologist and author, testified that statutes such as the one in question actually serves to harm women. Dr. Friedman stated that a law which mandates that women's breasts be covered while failing to require that men's breasts be covered serves only to give credence to archaic notions about the differences between the sexes. Such notions are not based in fact, given that the "eroticism" connected with breasts are only of a cultural, social nature and not of a biological nature. See Saint v. Nebraska School Activities Association, 684 F.Supp. 626, 629 (D. Neb., 1988), quoting from Force by Force v. Pierce City, R-VI School District, 570 F.Supp. 1020, 1029 (W.D. Mo., 1983):

> Such a paternalistic gender-based classification, that is, one resulting from ascribing a particular trait or quality to one sex, when not all share inherently unfair but generally tends only to perpetuate stereotypical notions regarding the proper rules of men and women.

Dr. Friedman testified that the "cultural obsession with breasts", among other things, has led many women to become dissatisfied with their bodies, a condition with in turn can lead to such diseases as anorexia and bulimia. Furthermore, any statute which codifies the prohibition against the exposure of women's breasts can only serve to perpetuate this unnatural fascination with female breasts. This, in turn, heightens the above-described potential for harm to women. Therefore, the statute is unconstitutional since its gender-based discrimination not only fails to serve any important governmental interest but actually contravenes an important government interest.

CONCLUSION

APPELLANT'S CONVICTION SHOULD BE OVERTURNED AS PENAL LAW SECTION 245.01 DENIES WOMEN EQUAL PROTECTION BY DEPRIVING THEM OF A RIGHT SIMILARLY ACCORDED MEN THEREBY VIOLATING BOTH THE NEW YORK AND THE UNITED STATES CONSTITUTIONS.

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